06-1760

06-2750 (Con.), 06-5358 (Con.)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

FOX TELEVISION STATIONS, CBS BROADCASTING INC., WLS TELEVISION INC., KTRK TELEVISION INC., KMBC HEARST-ARGYLE TELEVISION INC., And ABC INC., Petitioners,

V.

FEDERAL COMMUNICATIONS COMMISSION, And UNITED STATES OF AMERICA, Respondents.

NBC UNIVERSAL INC., NBC TELEMUNDO LICENSE CO., NBC TELEVISION ASSOC., NBC TELEVISION AFFILIATES, FBC TELEVISION AFFILIATES, CBS NETWORK AFFILIATES ASSOC., ABC TELEVISION ASSOCIATES, CENTER FOR CREATIVE COMMUNITY INC., d/b/a CENTER FOR CREATIVE VOICES IN MEDIA, INC., FUTURE OF MUSIC COALITION, Intervenors.

Appeal of Administrative Agency

AMICUS BRIEF OF

DECENCY ENFORCEMENT CENTER FOR TELEVISION

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This Amicus Brief supports affirmance of the Federal Communications Commission, Respondent.

CORPORATE DISCLOSURE STATEMENT

Decency Enforcement Center for Television, pursuant to Rule 26.1, Fed. R. App. P., hereby states that it is a nongovernmental, nonprofit corporation, and:

1. It has no parent company, and
2. No publicly held corporation holds 10% or more of its stock. (Decency Enforcement Center for Television is incorporated on a nonstock basis).

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INTEREST OF AMICI AND AUTHORITY TO FILE[1]

Decency Enforcement Center for Television, Amicus Curaie, is a Michigan nonprofit corporation with the express purpose, in its Articles of Incorporation, of legally defending and enforcing public decency laws, especially those for television. While the core function of the Federal Communications Commission is to enforce 18 U.S.C. 1464, this Amicus files amicus briefs in federal cases in which the established constitutionality of the broadcast indecency prohibition in that statute is being challenged. The U.S. Supreme Court decision in this case was in accordance with relief requested by this Amicus, which has also filed briefs in this Circuit in another case, in the Third Circuit, and in a U.S. District Court. Amicus advocates from the perspective of the American TV viewer, particularly the approximately 30 million who lack any blocking technology, and who depend entirely upon 18 U.S. C. 1464 as their ONLY protection from broadcast indecency.

Because some intervenors and amicus supporting petitioner Fox argue for this Court to overrule the U.S. Supreme Court, by finding what they call "the FCC's indecency regime" under 18 U.S.C. 1464 to be unconstitutional, it is necessary for Decency Enforcement Center for Television (hereinafter "Decent TV"), per its corporate purpose, to file this brief.

[1] Written consent to this brief has been received from all parties.

America's 300 plus million citizens cannot just assume that all necessary arguments to protect them, the sanctity of their homes, their children, their freedom of choice, and all quality of life from uninvited indecency will be made by Respondents (despite Amici's high level of confidence in Respondents' counsel, and partly due to briefing length limitations). U.S. citizens have an absolute right to participate in the courts, to make all necessary legal and factual replies to arguments for their own protection. Also, many of the arguments supporting petitioner Fox mis-state law and misrepresent facts, and such a critical court decision simply CANNOT be based on, or perpetuate, false information. Amicus is successor in interest to Thomas B. North, who filed an amicus brief in this case in 2007. Amicus has authority to file this brief pursuant to Rule 29 (a), Fed. R. App. P.

ARGUMENTS

I. PETITIONER'S AMICI ACLU, ET AL, LACK **ANY** STANDING FOR THEIR REQUEST FOR RELIEF, FAR EXCEEDING THE RELIEF REQUESTED BY PETITIONER ITSELF.

American Civil Liberties Union et al joined in an amicus brief supporting Petitioner Fox, and secondarily requested this Court to "enjoin the FCC's entire indecency and profanity regime." Amici do not define "regime", nor do they cite legal authority for injunctive relief. They may be obscurely arguing ALL broadcast indecency and/or profanity restrictions, from 18 U.S.C. 1464, and *FCC v Pacifica, 438 US 726 (1978),* to the FCC's regulations are unconstitutional. NONE of the petitioners, intervenors or amicus have **expressly** asked the Court to find the statute unconstitutional. Fox has requested reversal of the indecency finding of the Federal Communications Commission (hereinafter "FCC") of the two subject TV programs, and secondarily asked the Court to find the FCC's change of policy as to live, unscripted, fleeting expletives by third parties to be unconstitutional – NO MORE. Fox has not requested or argued that the statute be found unconstitutional, or *FCC v Pacific, supra,* be disturbed.

Amici have not even attempted to meet their legal burden of citing ANY legal authority supporting standing to independently request relief exceeding that

requested by Petitioner Fox itself. The very most that Amici ACLU et al can legally do is concur with Fox' request, which is limited to the facts of this case. This Court, therefore, is legally powerless to even consider the secondary request for relief by Amici ACLU et al, for an injunction against the FCC's "entire indecency and profanity regime", no matter how it is defined.

II. THIS COURT LACKS JURISDICTION AND POWER TO FIND BROADCAST INDECENCY RESTRICTIONS IN 18 U.S.C. 1464 OR FCC REGULATIONS UNCONSTITUTIONAL, DUE TO SUPREME COURT PRECEDENT.

A. This Court is bound by law and oath of its judges to apply the precedent from the U.S. Supreme Court in *FCC v Pacifica, supra,* which permanently established that the indecency restriction in 18 U.S.C. 1464 is constitutional, unless or until either the U.S. Constitution or the statute are amended in accordance with constitutional procedures.

As this Court stated in its June, 2007 decision in this case, "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." The Supreme Court "recognizes that judging the constitutionality of an Act of Congress is the gravest and most delicate duty that this Court is called on to perform." *NW Austin Municipal Utility District No. 1 Holder, 129 S. Ct. 2512 (2009),* citing *Blodgett v Holden, 275 U.S. 142.* Fox has also raised a "lack of scienter" argument, so only if that is decided against Fox, can this Court even reach any of the

constitutional arguments. In 2007, this Court properly declined to address any constitutional arguments, but in dicta, the majority expressed skepticism that "the Commission can provide a reasoned explanation for its "fleeting expletive" regime that would pass constitutional muster." This Court thus correctly limited any constitutional challenge in this case to its application to the FCC's changed policy concerning "fleeting expletives", by finding that the "FCC is free to regulate indecency", but perhaps not so robustly as in this case.

The First Amendment to the U.S. Constitution provides that "Congress shall make no law… impairing the right of free speech." The Constitution only changes if amended in accord with its own provisions, and it has not in this regard. No court, not even the Supreme Court, can amend the Constitution. No factual development, such as a technological advance, amends the Constitution. By the same token, once the Supreme Court has established that a statute is constitutional and is not "censorship" , such as it has with 18 U.S.C. 1464, in *Pacifica, supra,* it is permanent, unless the Constitution or statute are amended. Federal law is settled that courts apply the law to the facts to resolve disputes, not vice versa. U.S. citizens and entities (including television broadcasters) are required to conform

their behavior to the law, not expect that the law will change whenever their behavior deteriorates to violate the law.

This Court is bound by the law, and the oaths taken by the judges on the panel, to apply *Pacifica, supra,* to the facts. There has been no legal authority to support any suggestion that this Court can deviate from a strict application of that Supreme Court precedent in any way. The brief of Intervening Petitioner ABC Television Affiliates Association at argument I. B. (beginning p.12) contains an excellent and legally correct analysis of constitutional framework for this case. As stated therein, "It is not this Court's task to question or reexamine the continuing validity of the indecency statute, 18 U.S.C. 1464, and *Pacifica.*…" Another of petitioner's Intervenors, Center for Creative Voices, conceded in its 2006 brief in this case, that this Court cannot make any findings outside of a strict application of *Pacifica.* While stating that this Court does not have to "overrule or demean *Pacifica*", Intervenors ABC, CBS and NBC et al ask this Court to ignore that precedent, which it cannot legally do. Also, this Court's decision is only precedent in the Second Circuit, as a matter of law.

B. The "V-chip" and other TV technologies cannot possibly provide any basis to find 18 U.S.C. 1464, the "Radio Communications Act", unconstitutional, or to over turn "*Pacifica*", a broadcast **radio** case, when no blocking technology exists for radio.

18 U.S.C. 1464 is part of the Radio Communications Act, first enrolled in 1927. At that time, television was not yet in significant use. The Act has apparently been interpreted to apply to broadcast TV, as one form of radio communication. Any arguments that FCC regulations and/or the statute are now somehow unconstitutional as to indecency restriction are based entirely on the advent of the "V-chip" technology for broadcast TV. (This case has nothing to do with cable or satellite television, over which the FCC has no content jurisdiction). There is NO "V-chip", or any blocking technology in existence for broadcast radio, to which the Act is primarily addressed (or for that matter, for satellite radio). Therefore, the advent of the "V-chip", for broadcast **television** only, cannot possibly provide a basis to find the "**Radio** Communications Act" unconstitutional. Further, *Pacifica, supra,* was a radio, not TV, case. Therefore, the argument that changes in television technology have done away with the facts upon which *Pacifica* was predicated are preposterous, and merely wishful thinking.

None of the petitioners or their amicus have ever, in this case or any other, even attempted to explain how a TV "V-chip", or TV ratings of programs, undermine a court case or statute about radio, which has no blocking technology. Nor have they explained how any TV blocking technology would protect radio listeners from

indecency if the statutory restrictions (that apply to both) were found to be unconstitutional. That is because they cannot. Therefore, this television case cannot result in 18 U.S.C. 1464, the **Radio** Communications Act, being found unconstitutional, because the statutory, case law, and regulatory restrictions on broadcast indecency apply equally to radio, and are the only protections that radio listeners have. The Court must not be blinded by the narrow facts of the case, to fail to see the broad and devastating implications of any finding as to constitutionality of the statute itself.

C. While the Supreme Court declined to address constitutional arguments in this case, two Justices commented on *Pacifica*, one favoring its "continued wisdom" (despite dissenting on administrative law rulings) and the other committing numerous major legal and factual errors.

In this case, the Supreme Court reversed, on administrative law grounds, and seven justices declined to address or comment at all on *Pacifica, supra,* or general constitutionality of broadcast indecency regulation. Two justices, Stevens and Thomas, did comment on those arguments. Justice Stevens, while dissenting from the majority's administrative law ruling, did speak favorably of the "continued wisdom" of *Pacifica*, and expressed his disagreement with Justice Thomas' questions about that case.

Justice Thomas commented at length about *Pacifica*, and perhaps because no

constitutional issues were before the Supreme Court and therefore, were not fully briefed or argued, his comments serve only to display numerous egregious errors of law and fact, and a gross misunderstanding of *Pacifica* on his part. Those errors are as follows:

1. Justice Thomas erroneously stated that *Pacifica* was based on scarcity of spectrum space. The current brief of Intervenors ABC, CBS, NBC , et al correctly, at p. 20 (in footnote 10) state:

> "*Pacifica* did not rely on "spectrum scarcity" to justify indecency regulation and the Commission has confirmed that "it is the physical attributes of the broadcast medium, not any purported diminished First Amendment rights of broadcasters based on spectrum scarcity or licensing, that justify channeling of indecent material.""

The brief of Intervenor ABC Affiliates, at p. 13, points out that scarcity and limits of spectrum space are "laws of physics" that "have not changed" due to any evolution of the media marketplace. The facts and laws of physics prove the continued factual viability of both *Pacifica, supra*, and *Red Lion V FCC, 395 U.S. 367 (1969)*, while disproving the comments of Justice Thomas.

2. Justice Thomas erroneously stated that cable TV is no more intrusive than broadcast TV, ignoring indisputable fact that cable does not

"intrude", because it only goes where invited by subscription by consenting adults. Broadcasting intrudes upon everyone, everyplace.

3. Justice Thomas showed a misunderstanding of the "pervasiveness" analysis of *Pacifica*, discussed below, and relied upon unilateral statements of former commissioner Furchgott-Roth that were also contrary to the above laws. Justice Thomas also ignored the legal distinction between airwaves owned by the public, and licensed for use as a privilege, and other means of private delivery of other media owned by the provider, such as cable.
4. Justice Thomas said that the meaning of the law cannot turn on "modern necessity" or facts (as we have argued above), but then himself proposes to upset legal precedent, due to not only factual developments, but upon his false perceptions of facts that defy reality. A true textual approach to this issue would in fact restore literal meaning to 18 U.S.C. 1464 by prohibiting all broadcast indecency "24/7" as a reasonable restriction of speech in a public place, as sanctioned many times by the Supreme Court.

D. Contrary to the knowing misrepresentations of Fox to this Court, the U.S. Court of Appeals has found the FCC's definition of "indecent" and its regulation of broadcast indecency to NOT be unconstitutionally vague.

Fox, on p. 42 of its brief, says that "no court has ever reached a considered judgment that the FCC's regulation of indecency is not vague." To the contrary, the U.S. Court of Appeals for the D.C. Circuit in *Action for Childrens' Television v FCC, 852 F.2d. 1332 (1988),* Judge (now Supreme Court Justice on this case) Ruth Ginsburg writing for the majority, upheld the FCC's definition of "indecent" against vagueness and overbreadth challenges, as well as upholding the FCC's regulation of indecency in general, as constitutional. Not only is Fox wrong about this argument, they knew in advance of making the argument in this case that it is false. Fox Television made the same argument in the U.S. District Court for the District of Columbia, in *United States v Fox Television, Case No. 1:08-cv-00584-PLF*, in 2008 and again in 2009. This Amicus filed a brief in that case as well, citing *Action for Childrens' Television, supra,* and served a copy on Fox twice. Despite having actual knowledge that its argument is contrary to law, Fox continues its familiar pattern of persisting in arguments that have been repeatedly disproved, to mislead this Court.

Petitioners' Amicus ACLU et al go so far as to argue on p.27 of their brief that the Supreme Court has found the FCC's indecency standard to be "overbroad and

essentially vague", when NO such thing has ever happened. In the ONLY broadcast indecency case (*Pacifica)* prior to this, the Supreme Court to the contrary UPHELD the FCC's standard.

E. The facts underlying *Pacifica* and its " pervasiveness" analysis ALL remain true today, unaffected by any technological developments.

The U.S. Supreme Court in *Pacifica, supra,* found broadcast media to be "uniquely pervasive" and "accessible to children." Fox, its Intervenors and Amici continually, even after numerous arguments in this case and others, persist in misconstruing and misapplying those Supreme Court findings. This Court, although in dicta, committed the same error in its June, 2007, decision in this case, as did Justice Thomas in his Supreme Court concurring opinion. In fact, what is most pervasive in this case is a complete lack of understanding of the "pervasiveness" analysis of *Pacifica,* and even the meaning of the word "pervasive." The "pervasiveness" and "uniqueness" of broadcasting found by the Supreme Court were based on the facts that broadcasting, by the NATURE OF THAT MEDIUM TECHNOLOGICALLY, is the ONLY medium that GOES EVERYWHERE in the nation (whether subscribed to or not), but also does so on the PUBLIC AIRWAVES. "Pervasiveness" and "uniqueness", especially as used by the Supreme Court, have NOTHING TO DO with any other media, whether

cable/satellite TV, internet, etc. Broadcasting goes out into every building and every outdoor place. Further, within every building, it goes into every room, including childrens' bedrooms.

The Supreme Court's finding was based not just on accessibility in the home, but also in all public places. Broadcasting goes into schools, day care centers, nursing homes, restaurants, lodging places of all kinds, stores (including department and electronic stores where TV's and radios are on for all to see and hear), etc. Petitioners fail to tell the Court how people are to program a "V-chip" to protect their children and themselves from indecency in those places. It cannot even be argued, nor does government or any court have ANY power, to decide that any individual has to be subjected to even a risk of glimpsing or briefly encountering indecency in any of those public places. In fact, the Supreme Court has established the exact opposite as law, that citizens are NOT subject to absorbing a first blow of indecency before turning away at home or, to a slightly lesser degree, in any public place. The "V-chip" and ratings are not any kind of panacea at all. The public airwaves, by law, are a public place, NO different than a public street, road, sidewalk, park, etc. They must be treated the same way by the courts.

This Court need not take this Amicus' word. The Supreme Court's very

"pervasiveness" analysis follows from *Pacifica*:

> "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of the intruder. *Rowan v Post Office Dept., 397 U.S. 728, 990 S.Ct. 1484, 25 L.Ed. 2d 736.* Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent radio is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity to avoid a harm that has already taken place."

The foregoing is the "law of this land" and is absolutely binding upon this Court in every respect. It is full of factual realities that are as true today just as in 1978, and fully supports each and every point in this argument, completely undermining all of the contrary arguments that broadcasting is no longer uniquely pervasive. The express facts underlying *Pacifica,* that indecency over the airwaves confronts the citizen not only in public, but in the privacy of the home, and that viewers do not have to absorb a first blow of indecency, are completely unaffected by any factual technological developments, upon which petitioners base their entire constitutional arguments. The Supreme Court established that First Amendment rights of the citizen to be left alone "trump" those of broadcasters. The Supreme Court also

thereby rejected technology by which listeners may avoid speech as any substitute for constitutional direct regulation, negating all of the arguments about blocking technology.

Unlike broadcasting, ALL other mediums require invitation by subscription, payment of money, and more than just plugging in a TV or radio. Petitioners and their amicus continually ignore these most basic facts, acting as if the airwaves belong to them. But the airwaves are owned by the nation's citizens, and use by TV networks is a licensed privilege that carries minimal responsibilities, whether they want them or not. The FCC's Remand Order succinctly states a reasoned and thorough basis for treating broadcasting different than all other "speakers", as do all Supreme Court precedents.

Pacifica, supra, did NOT say that broadcasting is unique "because of technical limitations" or refer to an "inability of parents to control the broadcast content received in the home", as fabricated by Intervenors ABC, CBS and NBC et al in their briefs. On p.27, they argue that "…the courts have reassessed the constitutional validity of broadcast content restrictions as legal developments or technology altered the status quo", citing four cases. However, review of all four cases shows that NONE of them were about any technology, contrary to the

very arguments they are purported to support!

Some of the networks would like to make the law ignore the difference between broadcast and cable/satellite, so they could use indecency to try to compete with them. But broadcast TV, and cable/satellite TV are completely different industries. Cable and satellite do not go into every home like broadcasting does. NBC owns numerous cable TV networks, and those are the only correct platform for them to compete with other cable networks, not using broadcasting. There is no more right to use broadcasting to compete with cable, than there is to use broadcasting to compete with adult movie theaters or strip clubs.

And incredibly, Amici ACLU et al on p.26 of their brief show lack of even the most elementary knowledge, by saying that "cable TV enters the home exactly as broadcast TV does." Do they really NOT KNOW that cable TV enters the home on a cable owned by the provider and expressly requested and paid for by the resident, and broadcasting enters the home "pervasively" on the public airwaves, whether the resident wants them to or not? This alone completely destroys and eliminates any semblance of credibility of that amicus brief.

F. As is this Court, the FCC was legally bound in its Remand Order to act in accordance with 18 U.S.C. 1464, as mandated by Congress.

Fox Television and its Intervenors complain about the FCC's findings and rules. But the FCC's findings are those required of it by law, including case law precedents. The FCC has to answer to Congress and the citizens it represents. The FCC, in its findings, simply could not do what Petitioners argue it should have done, completely disregard the law, just because of factual developments. The FCC cannot thumb its nose at Congress or the Supreme Court, as Petitioners contend. The First Amendment is expressly directed to Congress. The FCC has no power to make independent constitutional determinations.

III. PETITIONERS' CONSTITUTIONAL ARGUMENTS ARE ESTOPPED AND INVALIDATED BY THEIR OWN REPORTED PUBLIC PROMISES DURING THE LEGISLATIVE PROCESS TO **NEVER** USE THE "V-CHIP" AS A BASIS FOR ANY COURT CHALLENGE.

Petitioner Fox, and Intervenors CBS, ABC and NBC, through their respective news bureaus, at the time of the legislative process that led to the "V-chip" and TV ratings, repeatedly and publicly reported that they had agreed with Congress, in testimony and/or otherwise, to never, under any circumstances whatsoever, use that legislation or the "V-chip" to do exactly what some of them are now doing in this case – argue that they should take the place of the indecency laws or rules. The Parents Television Council warned the public that the networks would renege, despite their promises to never do so. Any and all constitutional

challenges and arguments are estopped by those actions and promises. This Court must hold Fox Television, as well as CBS, ABC and NBC, to those promises, by rejecting all constitutional arguments in this case.

IV. THE "V-CHIP" AND RATINGS ARE LEGISLATIVE ISSUES, AND NOT OF ANY SIGNIFICANCE FOR THE JUDICIAL BRANCH.

If this Court were to find a conflict between 18 U.S.C. 1464 and the "V-chip" legislation, it is a matter for Congress to resolve in the legislative branch. Unlike the technologies in *Sable v FCC, 492 U.S. 115 (1989), United States v Playboy, 529 U.S. 816 (2000),* or *Reno v ACLU, 521 U.S. 844,* the "V-chip" technology is a creature of law, mandated by Congress to be created and implemented. Therefore, unlike the foregoing cases, we have at most a conflict between two different statutes by Congress. (There really is not even any conflict at all, given the point later herein that one statute was enacted to compliment the other).

The only appropriate legal recourse for the networks is to ask Congress to initiate legislative procedures to resolve any perceived conflict, rather than request relief from this Court on a legislative matter. There is simply no judicial issue at all; there is at most a minor conflict between the implementation of two Congressional acts that were intended to compliment and supplement one another. The later "V-chip" legislation cannot be accurately viewed as having created any

constitutional issue. In fact, if one statute or the other need to be repealed or stricken, it is the "V-chip" legislation, given its history of abject failure and lack of universal application, as will be discussed further herein.

V. 18 U.S.C. 1464 REMAINS THE LEAST RESTRICTIVE MEANS OF PROTECTING CHILDREN AND UNCONSENTING ADULTS FROM BROADCAST INDECENCY IN THEIR OWN HOMES AND ALL PUBLIC PLACES.

A. There is no legal basis upon which to find that the indecency laws and regulations are no longer the least restrictive means.

For broadcasting, a "least restrictive means" analysis has already been established and conducted, in *Pacifica, supra,* and other cases, by the federal courts. Some petitioners suggest that should be changed to a "strict scrutiny" analysis. There is no legal authority cited for a proposition that such analysis, once performed, is anything less than permanent. There is no legal authority that the development of new facts, such as technology, requires a new court case and new legal analysis, or that the Court of Appeals can change the applicable level of scrutiny.

Parents, broadcasters and the government all have an equal role in assisting one another in protecting children from indecency. The networks, however, are not only trying to shirk any and all responsibility - they also are fighting any governmental role, trying to leave parents out there alone. But as the most diligent

and responsible parents state, it is impossible for them to singlehandedly protect their children, without help from at least the government. Numerous realities bear this out – single parents, working parents, neglectful parents, etc. Children whose parents do not program a "V-chip" have as much right to be protected by government as children of diligent parents. How is a parent who allows their child to go to a friend's house supposed to program a "V-chip" in the friend's house to protect their own child? These real life situations all support the absolute need for direct regulation of broadcasting to continue. It bears reminding that the legal definition of "child" is EVERY person under 18 years of age.

Some parties cite *US v Playboy, 529 US 803 (2000)* for an argument that a means does not have to be 100% perfect to be the "least restrictive means." That is a misapplication of that case, which is vastly distinguishable from this case. In *Playboy*, there were cable TV blocking mechanisms that allowed some video and/or audio "signal bleed" of Playboy channel into some homes that had not subscribed to Playboy. First, that was a cable TV case, so only persons who had subscribed to cable had any chance of that problem to begin with; there was an initial buffer that is not present with broadcast TV. But also, there is a huge difference between a partial signal bleed that is correctable with a free phone call to the company, and a 68% error rate of the networks' assignment of ratings upon

which the "V-chip" entirely depends. It is the errors of Fox and their Intervenors that result in fully clear signals of unblocked indecency that circumvent the "V-chip", and as to which no technician can be called in.

In *Playboy*, the blocking technology was only a basis for finding a "less restrictive means" that rendered the law unconstitutional expressly because THE TECHNOLOGY WAS PROVIDED FREE OF CHARGE TO THE SUBSCRIBER WITHIN TWENTY FOUR HOURS AFTER A FREE TELEPHONE CALL TO THE PROVIDER. Applying the Supreme Court's *Playboy* decision to this case, the "V-chip" could only possibly be a "least restrictive means" if the networks actually provided, free of charge, a "V-chip" within twenty four hours after a free phone call to the network from any citizen requesting one.

The cases cited by petitioners consistently hold that television viewers do not have the legal burden of providing for themselves the cost of technology to AVOID uninvited indecency. Also, the technologies in cases of first impression like *Playboy, supra; Sable, supra; Reno v ACLU, supra,* and *Ashcroft v ACLU, 542 U.S. 656 (2004)* are not within operational control of the provider, unlike the "V-chip" controlled by the networks through ratings. The proposed "V-chip only" regime would not meet the interest of the people being able to protect themselves

FROM the broadcasters and their indecency.

Regardless of effectiveness of various technologies, AMERICA'S CITIZENS CONSTITUTIONALLY HAVE STATUTORILY REQUIRED A MEANS OF PROTECTION AGAINST BROADCAST INDECENCY THAT IS **UNIVERSAL TO THEIR BROADCAST AIRWAVES**, AND THE PROPOSED "V-CHIP ONLY" REGIME IS NOT UNIVERSAL, BY ADMISSION OF FOX AND SUPPORTERS. The broadcasters ignore the absolute constitutional right of Americans to govern the privilege of using THEIR public airwaves.

B. It is Congress' intent that 18 U.S.C. 1464 restrictions on indecent broadcasts be enforced.

In the legislative process for the "V-chip" and TV ratings, Congress and the then-President clearly and repeatedly stated that the "V-chip" and ratings were intended to SUPPLEMENT the indecency laws, not supplant them. The Congress and President who signed the legislation into law also said the "V-chip" and ratings would be ADDITIONAL tools along WITH the indecency laws, to assist parents. The Congressional record supports this. Just a couple years ago, Congress, by overwhelming margins and with overwhelming public support, passed legislation

increasing about ten-fold the fines for violation of broadcast indecency laws. That legislation has not been challenged in any way. This Court is required by law to defer to this Congressional intent.

C. The "V-chip" is not available in many televisions or homes.

In many homes, one or more televisions do not have the "V-chip" that petitioners rely on. Many televisions pre-date the "V-chip", yet work fine. It does not matter if the percentage of TV's with a "V-chip" is increasing. The Court must act from the perspective of the individual families that do NOT have blocking technology, no matter how small a percentage they become. Many Americans deliberately do not have cable or satellite, for the express reason of keeping indecency out of their home, away from their children. The "V-chip" legislation does not apply at all to TV's with smaller than a 13 inch screen. The statistics quoted of the number of televisions sold since the legislation are meaningless, by not saying how many of those televisions had a small screen, and therefore, no "V-chip." This Court should take judicial notice that smaller televisions generally end up in bedrooms, where there is less space, and mostly in childrens' bedrooms.

Petitioner's Amicus Media Institute argued that 86% of American homes have cable or satellite TV. But not all satellite systems have blocking technology, and

most satellite subscribers are either unable to receive broadcast networks over their satellite systems, or choose not to, because of extra fees. Those satellite customers still receive their broadcast networks over a regular antenna, but yet their numbers are included in the 86%. The number of U.S. homes that do not have ANY TV blocking technology is over 15, 000,000, based on FCC findings in the record, and over 30,000,000 Americans live in those homes. Petitioners treat these 30,000,000 individuals as insignificant, and to be sacrificed for their agenda; in reality, that is a larger number than the population of most nations, and each is a person that has an absolute right to not be violated by indecency.

Of the homes that have cable or satellite TV, industry statistics establish that less than half have ever subscribed to any "premium" channel. In addition to the 42,000,000 Americans who have broadcast TV only, another 90,000,000 only subscribe to the most basic cable tier, which has been more restrained than the broadcast networks as to indecency. Therefore, the high percentage of homes that subscribe to cable or satellite cannot be considered to have invited indecency into their homes with their subscription.

D. The "V-chip" is not effective, partly because it relies entirely on the networks' rating of programs, which has a 68% or higher error rate, for the deliberate reason of avoiding loss of advertising revenue.

The “V-chip”, which petitioners would have everyone rely on, does not work, period. It technologically depends entirely on programming in the rating of shows sought to be blocked. Those ratings are assigned by the networks themselves. There are clear, objective criteria for each of the ratings and guidelines as to the suitable minimum ages of viewers, but many television programs are exempt from ratings, and there is no oversight of ratings. How do petitioners and their Intervenors and Amici propose that parents and viewers use a “V-chip” to block programs that are unrated? They cannot! The only protection against indecency in those unrated programs is direct legal regulation. As to rated programs, petitioner networks seek a regime that is 100% within their control. In all homes and public places, they seek to be the SOLE arbiter of what ALL people see and hear without any escape, by permanently eliminating legal direct regulation, and controlling and circumventing blocking technology through mis-rating programs, without accountability or consequence. Petitioner’s Intervenors and Amici concede leaving the prohibition against broadcast obscenity in 18 U.S.C. 1464 in place (for now), but then the entertainment industry has already succeeded in establishing legal precedent that virtually nothing is legally obscene, not even most XXX rated movies, such as “Deep Throat.” 18 U.S.C. 1464 and *Pacifica, supra,* are ALL that stand in the way of a forced feeding of hardcore pornography upon every

American in their own home.

In contradictory fashion, the networks trumpet the "V-chip" technology, which is proven to be worthless and ineffective, while refusing to consistently implement, for live broadcasts a technology that does work, the five second delay. All of petitioners' arguments are fraught with a "one way street" mentality that they do not want anything to be implemented or effective that might in any way block, restrict or sanction any of their broadcasts. They, in short, seek to force indecent broadcasts on ALL persons, not just those who choose them.

A .320 batting average is great for a baseball player, but is the pathetic accuracy percentage of the networks in rating TV programs. The networks seek to be the ultimate "foxes guarding the henhouse", so that they do not have to answer to the law when they slaughter all the hens.

Further, when the networks misrate the programs, almost always it is in the direction of rating them as suitable for children that the criteria says they are not suitable for. Sometimes they are off by TWO rating levels. Shows meeting TV-MA criteria are not just rated TV-14, but sometimes TV-PG! The FCC hit the nail on the head by finding in the Remand Order that the networks probably do this deliberately, in order to circumvent the operation of the "V-chip." There is

financial incentive for misrating programs, because the more adult the rating, the smaller the audience, and lower ad rates commanded. And then the networks have the gall to try to hold the FCC to a prediction it made of the effectiveness of the "V-chip", when the FCC could not know of the networks' own plans to circumvent the "V-chip" by misrating shows. Many of the petitioners' arguments have the pattern of using a problem they have created as a claimed justification to relax or eliminate the laws that are all that is keeping them from creating more problems, and the cycle is perpetual if not stopped by the courts.

The high error rates in rating of programs by the networks has been published for years, and the networks have tacitly admitted them, by never disagreeing with them. There is no evidence in the record upon which to base a finding that the "V-chip", the sole basis of the constitutional challenges, is effective, as required by the case law to constitute a "least restrictive means", even if the law allowed the issue as to broadcasting to be revisited. The FCC, on the agreed remand in this case in 2006, had a 60 day comment period within which the networks could have made a record of a better accuracy rate in rating programs, if it existed, and they did not even attempt to do so. The "V-chip" is completely worthless, a failed experiment gone awry, and is certainly not any basis for disturbing a long established law.

VI. THE TWO SUBJECT TELEVISION PROGRAMS PERFECTLY PROVE THE INEFFECTIVENESS OF THE V-CHIP IN BLOCKING OF INDECENCY.

Fox, its Intevenors and Amici argue that V-chip technology enables parents to block any indecent TV program from their home. Yet, the two television programs in this case prove the V-chip's ineffectiveness. While some of Fox' Intervenors and Amici, such as ABC Affiliates, admit the constitutionality of direct regulation of broadcast indecency under 18 U.S.C. 1464, a few others have suggested that the FCC's whole "indecency regime" is unconstitutional, and would replace it entirely with ONLY the V-chip.

The FCC, in the Remand Order, has done an excellent job of pointing out that even if a parent did everything that Fox and their Intervenors/Amici suggest, the V-chip still could not possibly have worked to block either of the two subject broadcasts. Both were rated by Fox as TV PG. Yet both programs contained TV MA (for adults only) language. All four major networks admit in their briefs that Fox mis-rated these two shows by TWO ratings levels. So, every single parent who programmed a V-chip to block out all such language by blocking all TV MA rated shows, still failed to block that language from their homes.

The Court does not need to surmise about the networks' proposed "V-chip only

regime" to protect people from indecency, because we already have absolute experiential proof, in this very case, of complete and utter ineffectiveness. The facts of this case contradict and negate the entire factual basis of the networks' constitutional arguments!!

In the two subject programs at issue, the networks probably did not know the expletives would be uttered live when they assigned the TV PG ratings. But rather than exonerate the networks or support their arguments, those facts illustrate what would happen in the new "regime" proposed by the networks and their supporters. Given the facts in the case record that the networks mis-rate their own TV programs almost 70% of the time even when they DO KNOW in advance what the script is, any defense of "not knowing", as support for a V-chip only regime, is a smokescreen.

The "V-chip" does not come even remotely close to meeting the "effectiveness" standard set forth by *Sable v FCC, supra*, to sustain the technology as any kind of substitute for direct regulation. The networks' approach to indecency, that everyone just throw up their hands and say "Oh well, we tried, because we put some technology out there, even if it doesn't work" does not fly or pass any muster. There must be evidence that technology is "effective" to be

considered, and despite the 60 remand period to make a record, the record is completely devoid of any such evidence as to the "V-chip."

VII. THE AMICUS BRIEFS OF FORMER COMMISSIONERS/ OFFICICALS, AND ACLU ET AL, FOR PETITIONER, LACK CREDIBILIITY.

Some former FCC commissioners and officials have filed an amicus brief supporting Fox Television, as did ACLU et al. The officials were on the FCC when it was failing in its job, shirking its core central function of enforcing 18 U.S.C. 1464, and bending over backwards to dismiss all complaints of broadcast television indecency. Those former officials seek to bind the current Commissioners, who are finally starting to do the job, to their own former lack of performance.

ACLU et al reveal their mindset by arguing that there just are not enough hours after 10 p.m. for all the indecency they want broadcasted, and that indecency is actually "valuable for many children." These absurd assertions evidence complete lack of credibility and the unliveable "anything goes" society they want.

The officials' example of a Public Broadcasting telecast, on pp. 17-19 of their brief, show they would have full, frontal male nudity forced into the homes of, and thereby upon, every child, woman and man in the United States, and also into all

public places where a TV is on!!!! The former officials advocate the commission of sexual offenses upon all citizens. Just a few such events would do NO LESS THAN completely destroy U.S. civilization if allowed, and with it, ALL quality of life in this nation.

VIII.AMERICANS COMPLETELY RELY ON 18 U.S.C. 1464 FOR PROTECTION FROM INDECENCY IN THEIR HOMES AND IN ALL PUBLIC PLACES IN THEIR DAILY LIVES.

For over eighty years, all Americans, consciously and subconsciously, have completely relied on 18 U.S.C. 1464 for protection against indecency. For most Americans' entire lives, this statute has been a foundational fact of daily life, as they go about their affairs at home, in public and all places. It is well known that there are just some things that cannot legally be said or shown via broadcasting. Because of that, people are free to have broadcast radio or TV on wherever they are and whoever they are with, without fear, during daytime hours. To strike down the statute in favor of a technology that does not exist for radio, or universally for TV, or work even where it exists, would amount to the greatest travesty in U.S. judicial history, pulling the rug out from every citizen's life, and literally making it unsafe to exist anywhere. It would be a legal earthquake of the highest magnitude. Decency is the hallmark of civilization, as any credible sociologist will attest. Our laws and court rulings must always reflect that decency is the universal rule, not an exception.

CONCLUSION

It is requested that this Court affirm the FCC. In the alternative, it is requested that the Court narrow its ruling to the case facts of live, unscripted, fleeting broadcast expletives by third parties, and again decline to address any constitutional argument. If the Court addresses constitutional arguments, it is bound by *Pacifica* and its factual findings. Review of that Supreme Court decision refutes the petitioners' claims that it was based on any facts that have since changed or been affected by any subsequent developments or technology. To the contrary, ALL facts underlying *Pacifica* , especially unique pervasiveness and accessibility of broadcasting, remain unchanged. At most, the Court should remand the case to the FCC, as it did in its 2007 decision.

Date:_____ Respectfully submitted:

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